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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/500,391	09/09/2004	Sanford Reich	642P002-US	9014
42754	7590	09/09/2008		
Nields & Lemack 176 E. Main Street Suite #5 Westboro, MA 01581			EXAMINER	
			HAND, MELANIE JO	
			ART UNIT	PAPER NUMBER
			3761	
			MAIL DATE	DELIVERY MODE
			09/09/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/500,391	Applicant(s) REICH ET AL.
Examiner MELANIE J. HAND	Art Unit 3761

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 04 August 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☒ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1, 2, 17, 25 and 26.
Claim(s) withdrawn from consideration: 18-24.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Tatyana Zalukaeva/
Supervisory Patent Examiner, Art Unit 3761

/Melanie J Hand/
Examiner, Art Unit 3761

Continuation of 3. NOTE: Applicant amended independent claim 25 to recite a shunt in addition to an implanted controller causing further search and consideration after a final action has been mailed. It is examiner's position, based upon applicant's specification, that the implantable controller is a shunt or that the controller includes or defines a shunt, which is not the same as a physically separate shunt. Therefore the claim as amended raises issues of new matter.

Continuation of 11, does NOT place the application in condition for allowance because:

1. Applicant's arguments filed August 4, 2008 have been fully considered but they are not persuasive. Applicant first argues that because fluid usually takes the path of least resistance, that Madsen does not teach a multi-modal drainage system. This is not persuasive because "usually" is not sufficient to discount the existence of the second pathway disclosed by Madsen. Applicant is encouraged to re-read the rejection of claim 1 where it is clearly explained that anti-siphon valve 10, when closed, forces the fluid through the other pathway 86, which is the "upright" path.

2. Applicant argues that the prior art of Madsen does not disclose that the selection of mode of fluid flow is controlled by the embedded microprocessor because the valves alone control the flow. This is not persuasive because the microprocessor sends signals to actuator 108 which "adjusts the adjustable barrier in order to prevent optimal treatment"> Optimal treatment is interpreted herein as providing drainage of excess CSF fluid without causing either underdrainage or overdrainage, which can occur, respectively, when the patient is in the supine position and the upright position. The adjustable barrier 36 has only two heights that it moves between and Madsen discloses that the height which is altered by the actuator, which is in turn controlled by the microprocessor, determines the threshold pressure for the fluid to unseat the diaphragm and flow through. (Col. 3, lines 52-57, Col. 4, lines 15-18, Col. 7, lines 14-17) Therefore the microprocessor clearly controls the selection of the mode of drainage, i.e. which path the fluid follows.

3. Applicants arguments regarding motivation to modify the prior art of Cowan are insufficient as Cowan is the secondary reference and is not the device being modified but is remedying the deficiency of Madsen regarding a wireless transceiver.

4. In light of the lack of persuasive arguments and amendments to the claims causing further search and consideration, the reply is not entered..